No. 83-784

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BUFFALO FORGE COMPANY, *et al.*,

Petitioners,

v.

OGDEN CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

JOHN L. WARDEN
125 Broad Street,
New York, New York 10004.
(212) 558-4000

Counsel for Respondent
Ogden Corporation

DAVID B. TULCHIN
SULLIVAN & CROMWELL
Of Counsel

November 18, 1983

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Section 14(e) of the Securities Exchange Act of 1934, 82 Stat. 457, as amended, 84 Stat. 1497-98, 15 U.S.C. § 78n(e) (1982) ..... *Passim*

Listing Pursuant to Rule 28.1

The following is a list of all parent companies, subsidiaries, except wholly owned subsidiaries (which includes subsidiaries with directors' qualifying shares), and affiliates of Ogden Corporation:

Name	*Place of Incorporation*
Alpine-Burtco Leisure Services, Ltd.	Canada
Burtco de Venezuela	Venezuela
Burtco Services, Ltd.	Canada
International Terminal Operating Co., Inc.	Delaware
Maquinas Danly Ltda.	Brazil
Ogden Bulk Systems Co., Inc.	New York
Ogden Congo Transport, Inc.	Liberia
Rototest Labs, Inc.	California
Tidewater Stevedoring Corp.	Virginia
Allen & Company and Associates*	New York Partnership

* Not an affiliate for purposes of the federal securities laws but listed because Allen & Company, its partners and members of their families own approximately 11% of Ogden Corporation's outstanding common stock.

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BRIEF IN OPPOSITION

Statement of the Case

Respondent disagrees with petitioners' statement of the case, insofar as is material to disposition of the petition, in the following particulars:

1. Contrary to the contention at pages 3 and 4 of the petition, the district court found that "the record shows that neither Ogden nor Buffalo Forge intended the sale of the treasury shares and the grant of the option to foreclose additional bidding, either by Ampco or by third parties" (C 24). The district court's findings were affirmed in their entirety by a unanimous court of appeals (B 4).

2. The district court did not "refuse to apply *Mobil*," as stated at page 5 of the petition. Rather, it found that the "actions in dispute in the case at bar simply do not constitute the kind of manipulative, 'lock-up' device found to be unlawful" in *Mobil* (C 23-24). The court of appeals affirmed: "In short, we agree with the district court that Ampco's reliance on [*Mobil*] was misplaced and that the defendants herein did not violate section 14(e)" (B 6).

To the extent that the proceedings in the lower courts are otherwise relevant to the Court's consideration of the petition, they are discussed in the argument below.

Summary of Argument

There is no occasion for plenary review of the decision below because the result reached does not, on the facts found, conflict with the result reached by the Sixth Circuit in *Mobil Corp.* v. *Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981). The arrangements held manipulative in *Mobil* were found to have blocked competitive bidding, while those challenged here stimulated such bidding. Moreover, the decision below, on its facts, is clearly correct under controlling decisions of this Court, including *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977) and *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462 (1977). Ampco sued solely for its own benefit as a competing tender offeror and thus lacked standing under *Piper*, and the transaction it challenged was not manipulative as that term was explained in *Santa Fe*. Accordingly, certiorari should be denied.

ARGUMENT

I.

The Decision Below Does Not Conflict With the Sixth Circuit's Decision in *Mobil* v. *Marathon*.

In *Mobil* the Sixth Circuit found that certain extraordinary options granted by Marathon (then the target of a tender offer by Mobil) to its "white knight," United States Steel, "had the effect of creating an artificial price ceiling in the tender offer market for Marathon common shares," 669 F.2d at 375, and "for all practical purposes completely block[ed] normal healthy market activity," *id.* at 374. On these facts, the Sixth Circuit held that "the particular options granted to USS by Marathon under the circumstances of this tender offer contest constitute 'manipulative acts' in connection with the tender offer, violative of section 14(e) of the Williams Act." *Id.* at 377. The Sixth Circuit continued, however:

> "In so ruling, we do not purport to define a rule of decision for all claims of manipulation under the Williams Act, or indeed for all forms of options which might be claimed to 'lock up' takeover battles or otherwise discourage competing tender offers. We leave these issues to developing law in this new and difficult area of securities regulation."

Ibid.

Following a full bench trial, the district court in this case found that the sale and optioning of treasury shares by Buffalo Forge (then the target of a tender offer at $25 per share by Ampco-Pittsburgh) to its "white knight," Ogden, had resulted from hard bargaining in arms-length negotiation of the merger agreement of which they were an integral part (C 12-15, 20-21). The court further found that the

announcement of the merger agreement at $32.75 per share set off a "flurry of bidding activity" which Ampco ultimately won at $37.50 (C 3), and that "neither Ogden nor Buffalo Forge intended the sale of the treasury shares and grant of the option to foreclose additional bidding, either by Ampco or by third parties" (C 24).

In response to Ampco's contention that the sale and optioning of treasury shares was unlawful under *Mobil*, the district court held not that *Mobil* was wrong, but that on these facts it was inapplicable:

> "The actions in dispute in the case at bar simply do not constitute the kind of manipulative, 'lock-up' device found to be unlawful by . . . the Sixth Circuit in the case of *Mobil Corp.* v. *Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981).
>
> "In *Mobil*, the court found that an option for the sale of certain key corporate assets made by the target corporation to one of two competing tender offerers violated section 14(e) because the option contract was intended to, and did, foreclose competitive bidding for control of the corporation, dramatically depleting its value by the sale of corporate assets.
>
> "In this case, the record shows that neither Ogden nor Buffalo Force intended the sale of the treasury shares and the grant of the option to foreclose additional bidding, either by Ampco or by third parties. *And, in fact, the sale of the treasury shares did not foreclose competitive bidding, but rather stimulated it.*"

(C 23-24; emphasis added).

On appeal, the court of appeals unanimously affirmed the district court's findings of fact, "all of which have substantial support in the evidence" (B 4). The court expressly

agreed that the result of the Buffalo Forge-Ogden merger agreement, of which the sale and optioning of the treasury shares was a part, was a "bidding war between Ampco and Ogden . . . which Ampco won with a bid of $37.50 per share" (B 3). Indeed, the court of appeals held, the decision of Buffalo Forge to strike a deal with Ogden actually "brought about an increase in Ampco's tender offer from $25 a share to $37.50 a share" (B 4).

While petitioners challenge the district court's affirmed findings by contending that the "purpose [of the sale and optioning of the treasury shares] was plainly and simply to enable Ogden to 'lock up' Buffalo Forge and to exclude all other bidders" (Petition 3), under the "two court" rule that question of fact is not for reargument here. *E.g.*, *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). Moreover, even petitioners concede that the sale and option of treasury shares did not "lock up" Buffalo Forge: "In any event, Ogden did not succeed. Ampco raised its bid to $37.50 cash, Ogden dropped out of the competition, and Ampco acquired Buffalo Forge" (Petition 4).

Thus, the facts found below required dismissal of Ampco's complaint and entry of judgment for Ogden whether or not the Second Circuit agreed with the Sixth Circuit that "particular options" in the "circumstances of [a particular] tender offer [can] constitute 'manipulative acts' " in violation of § 14(e). 669 F.2d at 377. The sale and option of treasury shares to Ogden clearly did not have the effect of creating a price ceiling, "artificial" or otherwise, on Buffalo Forge's shares and did not "completely block . . . normal healthy market activity" (*see* 669 F.2d at 374-75). Therefore, as the district court held, the rule of decision in *Mobil*—even if valid—cannot properly be invoked by petitioners (C 23-24).

In the circumstances of this case, the Second Circuit's disagreement with the reasoning of *Mobil* on the question of whether fully disclosed acts can ever constitute "manipulative" conduct in violation of § 14(e) was wholly unnecessary to its decision, which does not conflict with *Mobil* as to the proper result to be reached on these facts.

II.

The Decision Below Is in Full Accord With Controlling Decisions of This Court.

Before reaching the merits in *Mobil*, the Sixth Circuit carefully analyzed Mobil's standing as a competing tender offeror to challenge the arrangements between Marathon and United States Steel. 669 F.2d at 370-73. It allowed Mobil to maintain the action because it sought preliminary injunctive relief during the course of the contest which "would protect *all* Marathon shareholders by preventing management or competing tender offerors from failing to disclose fully or from using manipulative tactics." *Id.* at 372. Thus, the action was brought at the stage, *i.e.*, preliminary injunction, when this Court has said "relief can best be given," *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 42 (1977), and for the benefit of the class, *i.e.*, the shareholder-offerees, whom this Court has held to be the sole beneficiaries of the Williams Act, *id.* at 31-39.

Here, in contrast, though the parties asserted various federal disclosure claims and state-law fiduciary duty claims against one another from an early stage in the contest (*see* C 2-4, 17-18) and Ampco sought to enjoin the Ogden-Buffalo Forge merger agreement itself on disclosure grounds (1 Joint Appendix in the court of appeals 30-36), Ampco chose not to seek a preliminary injunction against the sale

and option of treasury shares to Ogden. Instead, after completing its takeover of Buffalo Forge, Ampco simply refused to pay for Ogden's Buffalo Forge shares when they were tendered (B 3). As Ampco's chairman testified at trial (1 Joint Appendix in the court of appeals 534) and its counsel conceded in the court of appeals (Ampco Brief, May 4, 1983, at 21), the only party which can benefit in any way from a decision in Ampco's favor is Ampco itself. And, while Ampco has chosen to sue in equity for rescission, the relief it seeks is the functional equivalent of a massive damage award.[1] Thus, while the court of appeals did not reach the issue (B 7), it is clear that under this Court's holding in *Piper, supra,* Ampco has no standing to maintain this action.

Moreover, the teaching of this Court as to the purpose of the Securities Exchange Act of 1934, of which the Williams Act is a part, is unequivocal: Its "fundamental purpose" is to implement a "philosophy of full disclosure," and not to regulate the "fairness of the terms of the transaction." *Santa Fe Indus., Inc.* v. *Green,* 430 U.S. 462, 477-78 (1977); *see also Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 199 (1976). Like the Exchange Act as a whole, the Williams Act amendments were "designed solely to get needed information to the investor." *Piper,* 430 U.S. at 31; *accord, Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975).

The Exchange Act's prohibition of "manipulative" acts or practices refers to "practices, such as wash sales, matched orders, or rigged prices, that are intended to *mislead* investors by artificially affecting market activity." *Santa Fe,*

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[1] Indeed, Ampco sought damages against the directors of Buffalo Force as an alternative to its rescission claim against Ogden. That claim, brought under state law, was dismissed below (B 4, C 25), and review of that disposition is not sought by the petition.

430 U.S. at 476 (emphasis added). Ampco has not contended that anyone was misled by the acts of which it complains, and the court of appeals held that "[t]here were no misleading, manipulative acts in the instant case" (B 6). In these circumstances, fidelity to this Court's decisions required dismissal of Ampco's claim under § 14(e).

Finally, this Court cautioned in *Santa Fe* that the Exchange Act was not intended to, and does not, "federalize . . . the law of corporations." 430 U.S. at 479. The two courts below found that the conduct of Ogden and Buffalo Forge's directors was entirely proper under the law of New York, that the challenged transactions had been undertaken in good faith and on the advice of counsel, and that those transactions had been beneficial to the shareholders of Buffalo Forge (B 4; C 7-17, 19-23). To disregard those findings—not properly disputable, and largely undisputed, here—and to find unlawful under the Exchange Act what was entirely lawful, indeed laudable, under New York law, would be to "federalize" corporate law in direct contravention of *Santa Fe*.

Whether or not the Sixth Circuit was correct in granting a federal remedy for the benefit of Marathon's shareholders on the extraordinary facts present in *Mobil* is not a question presented by the concrete and much different facts of this case. The decision below was clearly correct under, and in fact dictated by, this Court's decisions in *Piper* and *Santa Fe*. Should other courts of appeals follow *Mobil* in extending § 14(e) beyond the bounds heretofore established by this Court, the propriety of such an extension can be reviewed in a case concretely raising the issue.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN L. WARDEN
125 Broad Street,
New York, New York 10004.
(212) 558-4000

Counsel for Respondent
Ogden Corporation

DAVID B. TULCHIN
SULLIVAN & CROMWELL

Of Counsel

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